No. 95-561

(2)

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

THE OHIO AGRICULTURAL COMMODITY DEPOSITORS FUND, *et al.*,
Petitioners,

v.

EDMUND M. MAHERN, TRUSTEE FOR MERCHANTS GRAIN, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Does this case present a case or controversy under Article III of the United States Constitution?

2. If this case does present an Article III case or controversy, does the absence of a significant economic or other interest in its outcome impair its value as a vehicle to decide important constitutional issues?

3. Can the Court reach the issue of Congress' right to expose states to bankruptcy preference actions without first deciding whether the Petitioners are the State of Ohio for Eleventh Amendment purposes?

4. Should this Court decide the issue of Congress' right to expose states to bankruptcy preference litigation before more Circuits have had the opportunity to address the issue?

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

REASONS FOR DENYING THE WRIT

The Court should not grant a writ of *certiorari* in this action. This action may be moot now, and will doubtless be moot unless the Seventh Circuit reverses lower court rulings entered against the Respondent in a related case. Even in the event of a reversal by the Seventh Circuit in the related case, the outcome of this action would almost certainly have no real effect on the substantive rights of the parties.

Second, an obstacle blocks the path this case may offer to review the scope of Congress' power to abrogate a State's Eleventh Amendment immunity. Before reaching that issue, the Court would first have to resolve against

the Respondent the primary issue litigated below—whether the Petitioners are the State of Ohio for Eleventh Amendment purposes.

Third, consideration of this issue should be deferred until more circuits have considered it.

Fourth, in any event, this Court should not grant review of this case until the petition can be evaluated in light of this Court's disposition of *Seminole Tribe of Florida v. State of Florida* (No. 94-12), which was argued on October 11, 1995.

I. THE CASE MAY BE MOOT.

Respondent Edmund Mahern, bankruptcy trustee ("Trustee") for Merchants Grain, Inc. ("MGI") commenced this action in the United States Bankruptcy Court for the Southern District of Indiana ("Bankruptcy Court") on September 11, 1992. The Trustee seeks in this case recovery from the Petitioners (collectively, the "Fund") of approximately $3,000,000 in preferential transfers from debtor-to-be MGI to Ohio grain producers (the "Ohio Farmers") during the 90 days before MGI filed its bankruptcy petition. The Trustee brought this action against the Fund rather than the Ohio Farmers themselves under 11 U.S.C.A. § 550 which provides that a preferential transfer can be recovered either from the transferee or from a party that benefited from the transfer. Because the Fund indemnifies the Ohio Farmers against the great majority of their losses that would have resulted had they not received the preferential transfers, the Trustee chose to sue the Fund rather than approximately 170 individual farmers.

On February 4, 1993, the Bankruptcy Court dismissed this case, holding that the Fund was the State of Ohio for Eleventh Amendment purposes and therefore immune from lawsuits in federal court. While appealing the Bankruptcy Court's ruling, the Trustee on March 25, 1993 instituted a second action (the "Ohio Farmers Case")

naming as defendants the 170 Ohio Farmers who actually received the underlying transfers at issue in this case.[1] The only difference between this action and the Ohio Farmers Case is that this action is brought against the Fund as a party that benefited from the transfers, while the Ohio Farmers Case was brought directly against the Ohio Farmers.

On December 19, 1994, the Bankruptcy Court held in the Ohio Farmers Case that the underlying transfers were not preferential and entered summary judgment for the Ohio Farmers and against the Trustee. *See Merchants Grain, Inc. v. Adkins*, 184 Bankr. 52, 54 (S.D. Ind. 1995). The United States District Court for the Southern District of Indiana affirmed that grant of summary judgment, and the case is now being briefed before the United States Court of Appeals for the Seventh Circuit. *Id.*, Appeal No. 95-2625. It is that case to which the Fund refers in its petition at footnote 1 on page 3.

A. This Action Will Be Moot Unless The Seventh Circuit Reverses The Entry Of Summary Judgment In The Ohio Farmers Case.

The Ohio Farmers Case dismissal was based on the holding that the underlying transfers were not preferential. Unless reversed by the Seventh Circuit or this Court, that judgment will eliminate the substantive basis for the Trustee's claims in this action. The Trustee cannot prevail in this action if the underlying transfers are not avoidable, irrespective of any Eleventh Amendment issues.

In other words, if the Seventh Circuit affirms the Ohio Farmers Case judgment, the Fund would have no Article III standing to pursue this action, since it would have no concrete stake in the outcome of the controversy. *See, e.g., Valley Forge College v. Americans United*, 454 U.S.

[1] The Ohio Farmers Case actually began as four separate actions, later consolidated into one.

464, 472 (1982). Thus this case remains an Article III case or controversy only because of the possibility that the Seventh Circuit may reverse the Ohio Farmers Case judgment.

B. The Outcome Of This Matter Will Have Little Or No Impact On The Trustee's Efforts To Collect Assets Of The Estate Even If The Seventh Circuit Rules In The Trustee's Favor In The Ohio Farmers Case.

For a different reason, this case may be effectively moot even if the Seventh Circuit revives the Ohio Farmers Case. Because of the Fund's admitted indemnity obligations to the Ohio Farmers, the Trustee should in all likelihood recover any judgments against those farmers directly or indirectly from the Fund, regardless of how this Court rules in this case.

In memoranda filed by the Fund seeking to intervene in the Ohio Farmers Case, the Fund has already acknowledged that "a recovery from most of the farmers in [the Ohio Farmers Case] ultimately will be paid by the Ohio Agricultural Depositors Fund, . . ." Appendix at 3a-4a.[2] Thus the Trustee's judgment rights against the Ohio Farmers would create in the farmers corresponding indemnification rights against the Fund.

There may be some prospect that the Fund would nonetheless resist paying its statutory share of any judgments rendered against the Ohio Farmers, asserting a purported lack of standing by the Trustee to assert the farmers' indemnification claims. However, given the Fund's statutory duty to indemnify the Ohio Farmers and its admission that it would ultimately pay its statutory share of any preference judgments against the farmers, the Trustee should easily overcome such resistance by garnishing the farmers' rights against the Fund.

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[2] The Trustee appends hereto as an Appendix relevant parts of the Fund's Motion For Leave To Intervene in the Ohio Farmers Case.

Whether the underlying transfers are avoidable will be determined by the Seventh Circuit in the Ohio Farmers Case. The Trustee has maintained the pursuit of this action only to preserve the right to collect directly from the Fund, as opposed to garnishing the judgment-debtor farmers' rights against the Fund. It is far from clear, however, that the possibility of that combination of events occurring—(1) reversal of the Ohio Farmers Case by the Seventh Circuit, (2) a subsequent judgment in favor of the Trustee in the Ohio Farmers Case, and (3) resistance by the Fund of its admitted obligation to pay its share of those judgments against the Ohio Farmers—sustains an Article III case or controversy, let alone a case meriting the time and attention of this Court.[3] In short, the outcome of this action will likely have no real impact on the substantive rights of the parties in this case.

For the reasons set forth above, even if this action is presently a case or controversy under Article III of the Constitution, it may not remain one for long. Moreover, it at most only technically remains a case or controversy, leaving the actual stakes low enough to counsel against a grant of *certiorari*.

II. A THRESHOLD ISSUE PREVENTS CONSIDERATION OF THE PURPORTED QUESTIONS PRESENTED.

Even if this Court were to grant *certiorari* in this case, it would not be able to proceed directly to the constitutional question of whether Congress may expose states to liability for the avoidance of preferences under the Bankruptcy Clause. Instead, the Court would first have to address the threshold question that occupied the courts below: Is the Fund really the State of Ohio for Eleventh

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[3] In fact, the Trustee would agree to dismiss this action if the Fund would stipulate that it would pay its statutory share of any preference judgments rendered for the Trustee in the Ohio Farmers Case.

Amendment purposes? Analysis of the relevant factors leads to the conclusion that the Fund is not the State.

Among the most important of the factors to be weighed in determining when a quasi-governmental entity is entitled to Eleventh Amendment immunity is whether the judgment would be satisfied by the State Treasury. *Benning v. Board of Regents*, 928 F.2d 775 (7th Cir. 1991), *reh. den.*; *Crosetto v. State Bar of Wisconsin*, 12 F.3d 1396 (7th Cir. 1993), *reh. den.*, *cert. den.*, —— U.S. ——, 128 L.Ed.2d 867, 114 S.Ct. 2138 (1994); *cf. Paschal v. Jackson*, 936 F.2d 940 (7th Cir. 1991), *cert. den.* 502 U.S. 1081 (1992). That factor cuts against immunity here. The Fund is an independent commission financed not from the Ohio Treasury, but instead from fees assessed against grain handlers. Hence, the Ohio public fisc is not at risk. Indeed, the statute that creates the Fund expressly immunizes the State from liability for claims against the Fund, thus differentiating the State from the Fund.

The Court would have to address these issues before reaching the question of Congress' right to expose a state to suit. Properly analyzed, the threshold issue would moot the purported question presented.

III. THIS COURT SHOULD NOT CONSIDER THE ISSUE OF THE VALIDITY OF 11 U.S.C.A. § 106 UNTIL MORE CIRCUITS HAVE ADDRESSED THE ISSUE.

As of November 1, 1995, this case was the only reported appellate decision on the question of the constitutionality of Congress's exposure of states to preference liability in 11 U.S.C.A. § 106. Since the amendments accomplishing that waiver of sovereign immunity became effective only on October 22, 1994, other Circuits will doubtless have the opportunity to review the amendments in the near future. An Act of Congress is entitled to a presumption of constitutionality, and this case presents no urgent need for review. The better course under these

circumstances is for the Court to benefit from further development of the issues as additional courts of appeals evaluate them and reach conclusions that may or may not be in conflict with the decision below.

IV. *SEMINOLE TRIBE* MAY OR MAY NOT AID IN DECIDING THIS CASE.

A decision on the merits in *Seminole Tribe* may or may not affect the judgment in this case. Regardless of *Seminole Tribe's* disposition, the basis for the decision may affect the Court's decision on the *certiorari* question in this case.

If this Court were considering a grant of *certiorari* in this case (despite the mootness problems discussed above), it should hold the case pending the disposition of the *Seminole Tribe* case.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of *Certiorari* should be denied. In the alternative, the Petition should be held pending disposition of *Seminole Tribe of Florida v. State of Florida* (No. 94-12).

Respectfully submitted,

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November 3, 1995

APPENDIX

APPENDIX

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

Case No. 91-5047-RMV-11

IN RE: MERCHANTS GRAIN, INC.,
Debtor.

Adv. Pro. No. 93-0114

MERCHANTS GRAIN, INC.,
Plaintiffs,

v.

MARK & CHRIS ADKINS, *et al.*,
Defendants.

MOTION FOR LEAVE TO INTERVENE IN ADVERSARY PROCEEDINGS, TO STAY ADVERSARY PROCEEDINGS, AND TO CONSOLIDATE ADVERSARY PROCEEDINGS

The Ohio Agricultural Commodity Depositors Fund and the Ohio Commodity Advisory Commission (hereinafter referred to as "Movants") hereby move this Court, pursuant to Rules 7024 of the Federal Rules of Bankruptcy Procedure and Rule 24 of the Federal Rules of Civil Procedure, for an Order authorizing them to intervene in the above-captioned adversary proceeding, for the reasons set forth in the Memorandum in Support.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

Movants are Defendants in Adversary Proceeding Number 92-123, styled Edmund M. Mahern, Trustee, v. The Ohio Agricultural Commodity Depositors Fund and the Ohio Commodity Advisory Commission. The Trustee sued Movants in that Adversary Proceeding in order to collect from the Ohio Agricultural Commodity Depositors Fund amounts for which the fund would have allegedly been liable as a result of alleged payments made by Merchants Grain, Inc. within the ninety (90) day period preceding its bankruptcy petition. Trustee sought recovery from Movants under Section 547 of the Bankruptcy Code. Movants moved to dismiss that adversary proceeding on the basis that it was barred under the doctrine of sovereign immunity. Pursuant to an Order dated February 4, 1993, this Court entered an Order granting Movants' Motion to Dismiss on the basis that the Adversary Proceeding was barred by sovereign immunity.

The Trustee appealed the Court's decision granting the Motion to Dismiss, and the matter is now pending before the United States District Court for the Southern District of Indiana in Case Number IP93-187-C. While this appeal is pending, Trustee has filed the above-captioned Adversary Proceeding, and three (3) other similar Adversary Proceedings, (93-0114, 93-0115, 93-0116, and 93-0117) against the individual farmers allegedly paid by Merchants Grain, Inc. within the preference period. These Adversary Proceedings are seeking recovery from the farmers arising out of payments allegedly made by Merchants Grain to the farmers for grain that had been deposited with MGI. In the event the Trustee is successful in obtaining a recovery from these farmers, many of these farmers would be entitled to file a claim against the Ohio Agricultural Commodity Depositors Fund for all or part of the amount recovered by the Debtor. Since a recovery from most of the farmers in these Adversary Proceedings ultimately will be paid by the Ohio Agricultural Com-

modity Depositors Fund, Movants seek leave to intervene in these Adversary Proceedings at this time for the purpose of asserting the defense of sovereign immunity which defense has already been upheld by this Court in the prior proceeding. Movants do not intend to waive the defense of sovereign immunity in this or in any other Adversary Proceeding, nor do Movants consent to the jurisdiction of this Court at this time for any purpose other than raising the sovereign immunity defense.

Rule 24 of the Federal Rules of Civil Procedure, made applicable to Adversary Proceedings by Rule 7024 of the Federal Rules of Bankruptcy Procedure, provides both for permissive intervention and for intervention of right. Rule 24 provides, in part, as follows:

> Intervention
>
> (a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action:
>
> (1) when a statute of the United States confers an
>
> * * * * *